

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Attorney Docket No.: **IFF-0017**
Inventors: **Boden and Stumpf**
Serial No.: **10/738,323**
Filing Date: **December 16, 2003**
Examiner: **Ganey, Steven J.**
Customer No.: **26259**
Group Art Unit: **3752**
Confirmation No.: **7933**
Title: **Dispensing Device for Active Gels**

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Commissioner for Patents
U.S. Patent & Trademark Office
(AF)

REPLY BRIEF

I. Status of Claims

Claims 1 and 3-7 are pending in this application.

Claim 2 has been canceled.

Claims 1 and 3-7 have been rejected and are on appeal.

II. Grounds of Rejection to be Reviewed on Appeal

Whether claims 1 and 3-7 should stand rejected under 35 U.S.C. §103(a) as being unpatentable over Wefler et al. (U.S. Patent No. 5,903,710) in view of Orson, Sr. (U.S. Patent No. 5,081,104).

Whether claims 1 and 3-7 should stand rejected under 35 U.S.C. §102(b) as being anticipated by Orson, Sr. (U.S. Patent No. 5,081,104).

III. Arguments

A. The Rejection of Claims 1 and 3-7 Under 35 U.S.C. §103(a) Should Be Withdrawn

Claims 1 and 3-7 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Wefler et al. (U.S. Patent No. 5,903,710) in view of Orson, Sr. (U.S. Patent No. 5,081,104). At page 7 of the Examiner's Answer, the Examiner again insists that it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide an emanator for the wick of Wefler et al., as taught by Orson, Sr. since with such a modification, the addition of the emanator facilitates diffusion of the oil or fragrance into the surrounding environment by the process of evaporation.

However, the Examiner fails to appreciate that the problem of facilitating diffusion of the oil or fragrance into the surrounding environment is already solved by cartridge heating element of Wefler et al., which is for "heat-promotion of air freshener wicking into the atmosphere." See Wefler et al. at column 1, lines 53-56 and the abstract. It is noted that the U.S. Supreme Court recently reaffirmed that "[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of argument reliant upon *ex post* reasoning." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d at 1397. See also *Graham v. John Deere Co.*, 383 U.S. at 36, 148 USPQ at 474. Furthermore, in *KSR* the Supreme Court also qualified the issue of hindsight by stating that "[r]igid preventative rules that deny factfinders recourse to common sense, however, are neither necessary under our case law nor consistent with it." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 82 USPQ2d at 1397. In this regard, a person of ordinary skill would not have reasonably looked to Orson, Sr. to provide an emanator to facilitate diffusion of the

oil or fragrance into the surrounding environment because this problem was already solved by Wefler et al. Thus, an artisan having common sense at the time of the invention would not have reasonably considered providing an emanator for the wick of Wefler et al. in the manner suggested by the Examiner.

B. The Rejection of Claims 1 and 3-7 Under 35 U.S.C. §102(b) Should Be Withdrawn

Claims 1 and 3-6 have been newly rejected under 35 U.S.C. 102(b) as being anticipated by Orson, Sr. It is suggested that Orson, Sr. discloses all the featured elements of the instant invention. The Examiner suggests that with respect to Appellant's statements of intended use, *i.e.*, for storing an active gel comprising an oil or fragrance present in the active gel at about 90 to 99.8 percent by weight, the device of Orson, Sr. is capable of performing such an intended use. The Examiner alleges that the claim only requires a reservoir, which Orson, Sr. discloses and therefore meets the claim limitation since it is capable of storing an active gel comprising an oil or fragrance presence in the active gel at about 90 to 99.8 percent by weight. Appellants respectfully traverse this rejection.

Appellants' claim is drawn to a dispensing device comprising a reservoir for storing an active gel comprising an oil or fragrance present in the active gel at about 90 to 99.8 percent by weight. The specification at page 4, lines 14-18, indicates that the reservoir is sealed to eliminate venting and prevent spillage associated with liquid reservoirs devices. Furthermore, page 7, lines 3-8, teaches that the reservoir can be constructed of plastic, glass or a flexible polymeric material, metal, or other suitable material, with the proviso that the reservoir material *must* be impermeable and compatible with the active gel.

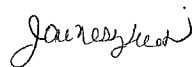
In order for a reference to anticipate a claimed invention, the anticipating reference must "be enabling and describe the applicant's claimed invention sufficiently to have placed it in possession of a person of ordinary skill in the field of the invention." *In re Paulsen*, 30 F.3d 1475, 1479 (Fed. Cir. 1994); see also *Seymour v. Osborne*, 78 U.S. (11 Wall.) 516, 555 (1870) (holding that an anticipating foreign publication must "contain and exhibit a substantial representation of the patented improvement, in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains, to make, construct, and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent").

The passages relied upon by the Examiner, *i.e.*, col. 6, lines 39-68 and col. 8, lines 2-37, simply fail to constitute an enabling disclosure to anticipate the present invention. While the cited passage at col. 8 suggests that the aqueous fragrance solution can be in the form of a paste or gel, this reference does not teach or suggest an active gel comprising an oil or fragrance present in the active gel at about 90 to 99.8 percent by weight, or the essential features of a reservoir for storing an active gel containing such high concentration of fragrance. The only requirement of the reservoir of Orson, Sr. is that it is non-reactive with the MMB and MMBE solubilizers and evaporation rate regulators. See the sentence spanning columns 6 and 7. In so far as Orson, Sr. only contemplates fragrances in the range 5%-20% (column 4, line 46 to column 5, line 5) and provides no teaching or suggestion of how to modify the reservoir disclosed therein to store an active gel comprising an oil or fragrance present in the active gel at about 90 to 99.8 percent by weight, the subject matter of claims 1 and 3-7 cannot be held as being anticipated by Orson, Sr.

IV. Conclusion

Reversal of the Examiner's rejections of claims 1 and 3-7 is therefore respectfully requested.

Respectfully submitted,



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